

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

U.S. BANK NATIONAL
ASSOCIATION,

Plaintiff,

vs.
SCOTT KMETY and DARLA KMETY,

Defendants.

CASE NO. 12cv2283 WQH BGS
ORDER

HAYES, Judge:

The matter before the Court is the Motion for Leave to Proceed in Forma Pauperis (ECF No. 2) filed by Defendant Scott Kmety (“Defendant”).

BACKGROUND

On July 3, 2012, Plaintiff U.S. Bank National Association initiated this action by filing a Verified Complaint for Unlawful Detainer in San Diego Superior Court. (ECF No. 1 at 6).

On September 9, 2012, Defendant Scott Kmety, proceeding pro se, filed a Notice of Removal (ECF No. 1) and a Motion for Leave to Proceed In Forma Pauperis (ECF No. 2) in this Court.

SUBJECT MATTER JURISDICTION

A defendant may remove a civil action from state court to federal court pursuant to the federal removal statute, based on either federal question or diversity jurisdiction. *See* 28 U.S.C. § 1441. For proper removal in a case involving multiple defendants, all defendants must consent to the removal. *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1224 (9th

1 Cir.2009). In the Ninth Circuit, “[o]ne defendant's timely removal notice containing an
 2 averment of the other defendants' consent and signed by an attorney of record is sufficient.”
 3 *Id.* “The removal statute is strictly construed, and any doubt about the right of removal requires
 4 resolution in favor of remand.” *Moore-Thomas v. Alaska Airline, Inc.*, 553 F.3d 1241, 1244
 5 (9th Cir. 2009) (citation omitted).

6 The Notice of Removal (ECF No. 1) is not signed by Defendant Darla Kmety, nor does
 7 it contain an “averment of [her] consent.” *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d
 8 at 1224.

9 **MOTION TO PROCEED IN FORMA PAUPERIS**

10 All parties instituting a civil action, suit, or proceeding in a district court of the United
 11 States, other than a petition for writ of habeas corpus, must pay a filing fee of \$350.00. 28
 12 U.S.C. § 1914(a). An action may proceed despite a party's failure to pay only if the party is
 13 granted leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a). See *Rodriguez*
 14 *v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). “To proceed in forma pauperis is a privilege not
 15 a right.” *Smart v. Heinze*, 347 F.2d 114, 116 (9th Cir. 1965).

16 In his accompanying declaration, Defendant states that he is self-employed and receives
 17 \$1,380.00 in take-home salary, but does not indicate a corresponding pay period. (ECF No.
 18 2 at 2). Defendant states that he has a checking account with U.S. Bank, with a balance of
 19 \$1.62, and that he owns an automobile which is not financed. Defendant states that he does
 20 not have any dependents. Defendant states that he is indebted to Bank of America, but fails
 21 to indicate the amount owed.

22 After reviewing the Motion for Leave to Proceed in Forma Pauperis and the
 23 accompanying declaration, the Court cannot determine whether Defendant Scott Kmety or
 24 Defendant Darla Kmety can afford the filing fee. The Court cannot determine how often
 25 Defendant earns \$1,380.00 in take-home pay, nor can it determine the amount of money
 26 Defendant owes to Bank of America. Defendant Darla Kmety has not joined in the motion
 27 filed by Defendant Scott Kmety, nor has she filed a separate motion to proceed in forma
 28 pauperis in this case. The Court concludes that Defendants are not entitled to proceed in forma

1 pauperis at this time.

2 **RULING OF THE COURT**

3 IT IS HEREBY ORDERED that within thirty (30) days from the date of this Order,
4 Defendants Scott Kmety and Darla Kmety shall file an amended notice of removal adequately
5 alleging the basis for this Court's subject matter jurisdiction.

6 IT IS FURTHER ORDERED that Defendant's Motion for Leave to Proceed In Forma
7 Pauperis (ECF No. 2) is DENIED without prejudice. No later than thirty (30) days from the
8 date of this Order, Defendants Scott Kmety and Darla Kmety shall either (1) pay the requisite
9 \$350.00 filing fee, or (2) submit a more detailed and comprehensive motion to proceed in
10 forma pauperis, describing each of Defendants' finances individually.

11 If Defendants fail to file an amended notice of removal and submit payment or an
12 amended motion to proceed in forma pauperis within thirty (30) days, the Court will close the
13 case and remand the action to San Diego County Superior Court. The Clerk of the Court is
14 ordered to provide two blank motion to proceed in forma pauperis forms to Defendants along
15 with this Order.

16 DATED: November 7, 2012

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18 **WILLIAM Q. HAYES**
United States District Judge

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